Office and Professional Employees International Union, Local No. 2, AFL-CIO *and* Janet Eichelberger. Cases 36-CB-982

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 27 May 1983 Administrative Law Judge Gordon J. Myatt issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that by failing to timely notify the Charging Party, Janet Eichelberger, of its decision not to process her grievance the Respondent breached its duty of fair representation and violated Section 8(b)(1)(A) of the Act. For the reasons set forth below, we disagree.

I. FACTUAL BACKGROUND

The International Association of Machinists and Aerospace Workers, Grand Lodge (the Machinists) employed Janet Eichelberger as a secretary in the Portland, Oregon regional office for approximately 4 years until her separation from employment 13 October 1981.[2] At all relevant times, the Respondent represented Eichelberger for purposes of collective bargaining.

During the period at issue, the Respondent and the Machinists were signatories to a nationwide collective-bargaining agreement that covered office clerical employees in the Machinists' regional offices. The collective-bargaining agreement provided that either an individual employee or the Union could file a grievance within 30 days of the event giving rise to the grievance. The Portland regional office, where Eichelberger was employed, had no union representative present. Leo J. Sheridan, the Respondent's president, located in Washington, D.C., administered the contract for the Portland regional office employees.

As part of her secretarial duties, Eichelberger attended a Machinists conference in Seattle, Washington, from 7 October to 10 October. On 13 October Eichelberger reported to work and was called into the office of Fred Waggoner, the assistant to the vice president in charge of the Portland regional office. Waggoner told Eichelberger of her superiors' dissatisfaction with her performance at the Seattle conference because she "talked too much about company expenses" and was "inebriated about half the time." Eichelberger denied the allegations. Waggoner requested her resignation. She said, "Fine," and left Waggoner's office. Eichelberger typed a letter of resignation, delivered it to Waggoner, turned in her keys, and left the office.

On 15 October Eichelberger telephoned Waggoner and requested a letter of recommendation. She also asked for her vacation and severance pay. Waggoner subsequently provided her with a letter of recommendation. As for the vacation and severance pay, Waggoner wrote to Eugene Glover, the Machinists' general secretary-treasurer, advising Glover of Eichelberger's resignation and requesting that she receive "everything she had coming." On 19 October Eichelberger wrote to Glover asking for severance pay.

On 28 October Eichelberger telephoned Sheridan's office in Washington, D.C. She spoke to a secretary and asked how long she had to file a grievance. The secretary told her she would check and get back to her. Later that day, the secretary called Eichelberger and told her the time limit was 30 days.

By letter dated 29 October, Glover replied to Eichelberger's claim for severance pay. He stated that severance pay was only provided for employees laid off for an indefinite time and, because Eichelberger voluntarily terminated her employment, she was not entitled to severance pay.

On 30 October, before receiving Glover's 29 October letter, Eichelberger sent Sheridan a six-page handwritten letter accompanied by several enclosures.[3] Eichelberger set forth a series of complaints and allegations regarding the treatment she received as a secretary for the Machinists. The letter began with a complaint about sexual harassment that allegedly occurred 2-1/2 years earlier. Next, Eichelberger discussed the hiring of another secretary in November 1979 at a rate of pay equal to hers, another secretary's pay raise, and the discharge of a woman who purchased a foreign car. Eichelberger then detailed additional instances of

[1] On 18 November 1983 Office and Professional Employees International Union, AFL-CIO,CLC, filed a motion requesting permission to submit an attached brief amicus curiae. The General Counsel opposes the motion. Under all the circumstances, we deny the motion on the ground that it was untimely filed.

[2] All dates refer to 1981 unless otherwise noted.

[3] The enclosures were a letter to Sheridan, dated 25 April 1980, concerning the hiring of a secretary at the same rate of pay as Eichelberger; a note to Eichelberger dealing with the Seattle conference; Eichelberger's resignation; and the Machinists' letter of recommendation.

alleged sexual harassment. Finally, the letter turned to the subject of the Seattle conference in October 1981, recounted Eichelberger's resignation and added complaints concerning her job description and her having to receive collect calls from the vice president's female friends. Eichelberger concluded by listing her "grievances."[4] They were: (1) sexual harassment;[5] (2) unequal treatment regarding wage rates based on her seniority; (3) accusations concerning her honesty in handling union funds; (4) intimidation and unfair tactics regarding the request for a letter of resignation; and (5) the failure to remit severance pay.

Sheridan received Eichelberger's letter and attachments on 2 November. He read them several times and concluded that there was no basis for a grievance. In Sheridan's view, Eichelberger did not challenge her termination or otherwise seek reinstatement. Sheridan believed that Eichelberger's resignation precluded her receipt of severance pay. As for the other complaints in the letter, Sheridan discerned no basis for a grievance.

In his testimony, Sheridan stated that, on the basis of the papers submitted, he saw no reason to engage in further investigation. He also admitted that he failed to inform Eichelberger of the decision not to file a grievance. He testified that, although he was aware that he should have sent Eichelberger a reply, he simply did not do so because he was involved in various litigation on the Respondent's behalf. The 30-day time period for a grievance over Eichelberger's separation from employment expired on or about 13 November.

On 2 December, having received no reply to her 30 October letter, Eichelberger sent another letter to Sheridan. In that letter, Eichelberger stated that she believed two aspects of her case were closely related, namely, her "forced" resignation and her entitlement to severance pay. She added that, in her view, her resignation was a constructive discharge because she was given the impression that she had no choice in the matter.

When Sheridan received the 2 December letter, he submitted all of the correspondence to the Respondent's attorney. After studying the matter, the attorney informed Sheridan that he saw no basis for a grievance.

On 25 January 1982 an attorney representing Eichelberger sent another letter to Sheridan demanding action. The Respondent did not reply to this letter.

[4] The letter stated that Eichelberger was treating the letter as the first step in the grievance process.

[5] At the end of the letter, Eichelberger wrote that the incidents of sexual harassment were too numerous to mention and that Sheridan could call her for additional details.

II. THE ADMINISTRATIVE LAW JUDGE'S DECISION

Based on the foregoing facts, the judge concluded that the Respondent breached its duty of fair representation and violated Section 8(b)(1)(A) of the Act. The judge rejected the Respondent's assertion that its conduct should be assessed in terms of its overall handling of Eichelberger's request to file a grievance. Instead, relying on the specific terms of the complaint, the judge found that inquiry should be limited to the Respondent's failure to notify Eichelberger in a timely manner of its decision not to process a grievance. Within this limited framework, the judge found that, although Sheridan was aware of the 30-day time limit on grievances, he presented no logical explanation or justification for his omission. Accordingly, the judge found that the Respondent's inaction was arbitrary and, therefore, violated the Act.

The judge's analysis is faulty in two related respects. First, he improperly limited the appropriate scope of inquiry. Secondly, although we agree with the judge that Sheridan was negligent in failing to inform Eichelberger of his decision not to file a grievance on her behalf, we conclude that such negligence, when viewed in the totality of the circumstances, is insufficient to constitute a breach of the duty of fair representation.

III. THE APPROPRIATE SCOPE OF INQUIRY

In limiting his analysis to Sheridan's failure to inform Eichelberger of his decision not to act, the judge relied on a strict reading of the complaint. While we agree that the complaint's literal terms are limited to Sheridan's omission, the parties in their opening statements outlined a much broader framework for evaluating the Respondent's actions. Thus, the General Counsel asserted that an essential factor was "what action the Respondent took or did not take, and upon what this action was based." The Respondent argued from the outset that the central issue was whether the Respondent's overall conduct in deciding not to process a grievance on Eichelberger's behalf constituted a failure to represent her fairly. Following their opening statements, the parties presented testimony and documentary evidence on all the circumstances surrounding Eichelberger's submissions to the Respondent and the Respondent's processing of her submissions. Accordingly, the parties plainly litigated the instant case on a basis broader than the specifics of the complaint.

In addition, the applicable legal standard for determining whether a union has breached its duty of fair representation requires a wider scope of in-

quiry than that the judge applied here. While the judge correctly noted that the appropriate standard is set forth in *Teamsters Local 692 (Great Western)*, 209 NLRB 446 (1974), he failed fully to incorporate the teaching of that case into his analysis.

In *Great Western*, an employee filed a claim protesting his discharge. The respondent union filed a grievance on his behalf. The grievance, however, was time-barred under the applicable collective-bargaining agreement. In a summary judgment proceeding before the Board, the General Counsel argued that the union's action or inaction was arbitrary and, therefore, constituted a breach of the union's duty of fair representation. The General Counsel argued that the employee filed an admittedly meritorious grievance, the union negligently failed to process it in a timely manner, and the employee thereby lost all rights to avail himself of the collective-bargaining agreement's grievance procedure.

In its decision, the Board reviewed its own and related court opinions and concluded that a union's conduct must be arbitrary or based on considerations that are "irrelevant, invidious, or unfair" before a breach of the duty of fair representation can be found. In this regard, the Board found that "negligence," standing alone, does not constitute arbitrary conduct. Rather, the General Counsel must demonstrate that "something more than mere negligence" occurred to justify a finding of arbitrariness and, therefore, a breach of a union's statutory duty. 209 NLRB at 447–448. The Board then applied the appropriate test to the facts before it and concluded that, although the union was negligent in failing to file a timely grievance, the requisite "something more" to justify finding a statutory breach was not demonstrated, and the complaint was dismissed.

In view of the requirement that the Board determine whether a union's conduct is "mere negligence" or "something more," we must look beyond the alleged act of negligence and examine the totality of the circumstances. Accordingly, we find that the judge erred in limiting his inquiry.

IV. ANALYSIS OF THE INSTANT CASE

Turning to the facts in the instant case, we agree with the judge that Sheridan was negligent in failing to inform Eichelberger of the Respondent's decision not to file a grievance on her behalf. Our review of the entire record, however, fails to disclose circumstances that constitute the "something more than mere negligence" necessary to convert the negligent omission into a violation of the Act.

Our analysis begins with the fact that Eichelberger's 30 October submission[6] was a somewhat discordant listing of alleged unfair treatment at the hands of the Machinists. The bulk of her letter related events that occurred 1 to 2 years earlier. Sheridan credibly testified that he reviewed the letter in detail several times. He then determined, probably correctly, that many of the complaints did not constitute appropriate grievance matters. As for the more recent events, Sheridan properly noted that Eichelberger did not request reinstatement or otherwise allege an unjust discharge. Eichelberger's letter of resignation convinced Sheridan of the futility of a grievance on the issuance of severance pay. In short, it is plain that Sheridan fully considered Eichelberger's claims. While all may not agree with his substantive conclusions concerning the grievance potential of each claim, his decisions clearly were not unreasonable; they fell well within the Respondent's broad discretion to process requests to file grievances as it deems appropriate.[7] In this respect, the Respondent fulfilled its statutory duty.

The more troublesome fact, however, is that Sheridan failed to inform Eichelberger of his decision. The issue here is whether under all the circumstances Sheridan's omission was simply negligence or something more. The judge held that it was something more, namely, arbitrary conduct. In so concluding, he cited Sheridan's inability to provide a substantial justification for his inaction, his knowledge of the 30-day time limit, and his finding that Eichelberger lost her right to file a grievance.[8] We do not agree.

Exactly when union conduct constitutes "something more than mere negligence" is not susceptible to precise definition. This is so because, as noted above, the totality of circumstances in each case must be examined and evaluated. Indeed, in *Great Western*, where the Board set forth the appropriate legal standard, it examined the facts of the case by referring to examples where the requisite "something more" or "arbitrariness" was present. Thus, where a union attempted to cause an employee to forfeit his contract seniority first on a groundless basis and then on a second basis in clear conflict with the collective-bargaining agreement,

[6] Although Eichelberger termed her letter the first step in the grievance procedure, her letter cannot properly be termed a grievance. The collective-bargaining agreement states that any grievance must be filed with the aggrieved employee's immediate supervisor. Accordingly, Eichelberger's letter is appropriately characterized as a request for the Respondent to file a grievance on her behalf.

[7] See, e.g., *Steelworkers Local 7748 (Eaton Corp.)*, 246 NLRB 12 (1979).

[8] The judge also cited *Auto Workers Local 417 (Falcon Industries)*, 245 NLRB 527, 534 (1979), and *Groves-Granite*, 229 NLRB 56, 62–63 (1977). These cases are discussed in fn. 12, below.

the Board found a violation.[9] Where the business agent responsible for filing an employee's discharge grievance refused even to discuss the matter with the employer because the employee opposed him at a union meeting, the Board found a failure to represent fairly.[10] Similarly, in subsequent decisions, the Board found that hostility toward the grieving employee,[11] or a willful deception of the employee,[12] constitutes more than mere negligence. Conversely, when a union's conduct is limited to an act or omission exhibiting a lack of sensitivity, the Board has refused to find a violation.[13]

In this context, the factors the judge cited simply do not rise to the level of "something more than mere negligence." Sheridan's inability to provide a substantial justification for his failure to notify Eichelberger means nothing more than that Sheridan was negligent. With respect to Sheridan's knowledge of the 30-day time limit, Eichelberger's own testimony reveals that she, too, was aware of the relevant time period. Despite this knowledge, she took no action beyond her initial letter until well after the grievance period expired. Only then did she write a second letter to Sheridan. Eichelberger's inaction also bears on the third factor the judge relied on, which was his conclusion that Eichelberger lost her contractual rights because of Sheridan's inaction. A careful analysis reveals that this was not the case. The collective-bargaining agreement clearly states that either the Respondent or the aggrieved employee can file a grievance. Eichelberger knew of the applicable time limitations, yet she chose to take no action beyond asking the Respondent to file a grievance for her.[14] While Sheridan's omission is not to be condoned, it is also inaccurate and unjust to conclude that this conduct served completely to extinguish Eichelberger's contractual rights. Eichelberger herself must bear some portion of the responsibility for sleeping on her rights.[15]

We find that, although the Respondent was negligent in neglecting to inform Eichelberger of its decision not to file a grievance, examination of the totality of the circumstances of the case fails to reveal the "something more than mere negligence" necessary to constitute a violation of the Act. Accordingly, we will dismiss the complaint.

ORDER

The complaint is dismissed.

[9] *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963).

[10] *Electrical Workers Local 485 (Automotive Plating)*, 170 NLRB 1234 (1968).

[11] *Pacific Coast Utilities Service*, 238 NLRB 599, 607 (1978).

[12] *Auto Workers Local 417 (Falcon Industries)*, 245 NLRB 527, 535 (1979). This case, which the judge cited, involved elements of willful deception, resentment of the employee by the union agent because the employee's friend had filed a racial discrimination charge, and other elements that distinguish it from the instant case. In *Groves-Granite*, 229 NLRB 56, 62–63 (1977), which the judge also cited, the union disparaged the employee in discussions with the employer, harbored personal hostility against the grievant, and engaged in a willful deception of the employee. We plainly do not have such elements here.

[13] *Washington-Baltimore Newspaper Guild, Local 35*, 239 NLRB 1321 (1979).

[14] Before writing Sheridan, Eichelberger demonstrated that she was willing and able to pursue claims on her own behalf. This is evidenced by her requests to Waggoner and Glover for severance and vacation pay. We also deem it significant that in *Great Western* the union's negligence alone rendered the grievance untimely, yet no violation was found.

[15] Our analysis in this case should not be read as imposing a strict duty on employees to pursue their own contractual rights with the skill and assiduousness of a union representative or a labor relations attorney. Obviously, unions exist in large part to advance the legitimate claims of individual employees. We do believe, however, that where, as here, the relevant contractual provisions are clear, and there is an avenue of redress independent of the union, an employee cannot simply submit a claim to the union, stand idly by while time limitations expire, and then claim unfair representation when the union thoroughly evaluates the claim, but finds it without merit.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon a charge filed by Janet Eichelberger (hereafter called Eichelberger) against Office and Professional Employees International Union, Local No. 2, AFL–CIO (hereafter called the Respondent Union), the Regional Director for Region 19 issued a complaint and notice of hearing on August 16, 1982. The complaint alleges that the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq. (hereafter called the Act). The Respondent filed an answer in which it admitted certain allegations of the complaint, denied others, and specifically denied committing any unfair labor practices.

A hearing was held in this matter in Portland, Oregon, on March 17, 1983. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present relevant and material evidence on the issue involved. Briefs were submitted by the parties and have been duly considered.

On the entire record in this case, including my observation of the witnesses while testifying, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings admit, and I find, that International Association of Machinists and Aerospace Workers, Grand Lodge (hereafter called the Machinists) is an unincorporated association functioning as a labor organization. The Machinists maintains a regional office in Portland, Oregon, where it is engaged in the business of representing employees in bargaining with employers with respect to wages, hours, and other terms and conditions of em-

ployment. At all times material herein, the Machinists has been signatory to a collective-bargaining agreement, nationwide in scope, with the Respondent Union covering, inter alia, the office clerical employees in its regional offices throughout the United States and Canada. In the course of its business operations during the past year, the Machinists has collected dues and initiation fees in excess of $50,000, and has remitted per capita taxes in excess of $25,000 from its Portland, Oregon regional office to the headquarters of the International Association of Machinists and Aerospace Workers located outside the State of Oregon. Based on the above, I find the Machinists is, and has been at all times material herein, an employer within the meaning of Section 2(2) engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties admit, and I find, that Office and Professional Employees International Union, Local No. 2, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Eichelberger's Employment with the Machinists*

The record discloses that Eichelberger has been an employer working at the Machinists' Northwest regional office for over 4 years. At the time of the events herein, she was the secretary to Stanley Jensen, the Machinists vice president in charge of the regional office. Eichelberger became a member of the Respondent Union upon commencement of her employment by the Machinists.

During the early part of October 1981,[1] the Machinists held a staff conference in Seattle, Washington. The conference began on October 7 and continued through October 10. Eichelberger was assigned to attend the conference and her duties included receiving registration fees from the delegates, distributing packets of materials to them, and performing whatever secretarial duties that might be assigned.

On two occasions while attending the conference, Eichelberger had lunch with two of the delegates, Dessie Harrison and Michael Wolfe. Eichelberger testified that, during one of these luncheon engagements, the three of them discussed office expenditures and agreed that the regional office was spending considerable money on expenses. Eichelberger stated she had three glasses of white wine during the course of her lunch.[2]

Eichelberger left the conference during the morning of October 10. The following Monday (October 12) was a holiday and she reported to work on October 13. When she arrived, she was called into Waggoner's office. Eichelberger testified that Waggoner said, "Janet we were very dissappointed in your performance at the staff conference. You talked too much about company expenses. You were inebriated about half the time." Eichelberger responded that the accusations were not true. Waggoner then told her, "We will have to ask for your resignation." At that point, Eichelberger replied, "Fine." She returned to her desk and typed up her resignation (G.C. Exh. 3), which she gave to Waggoner along with her office keys. Eichelberger then left the premises.[3]

On October 15, Eichelberger called Waggoner and requested a letter of recommendation, which she subsequently received. (See G.C. Exh. 4.) In her conversation with Waggoner, Eichelberger also asked for her vacation and severance pay. Waggoner in turn sent a letter to Eugene Glover, general secretary treasurer of the Machinists, on October 16 advising him of Eichelberger's resignation and requesting that "everything she had coming" be mailed directly to her (G.C. Exh. 5).

On October 19, Eichelberger wrote directly to Glover specifically renewing her request for severance pay. She noted that if her resignation had not been requested, she "would still be employed by the I.A.M." (G.C. Exh. 6.) Glover responded by a letter dated October 29. He informed Eichelbeger that, since she voluntarily terminated her employment with the Machinists, she was not entitled to severance pay. He stated that "[u]nder the terms of the contract [with the Respondent Union], severance pay is paid only when an employee is laid off for an indefinite period of time." (See G.C. Exh. 7.)

B. *The Filing of the Grievance with the Respondent Union*

On October 30, but prior to receipt of Glover's letter, Eichelberger wrote to Leo J. Sheridan, president of the Respondent Union. She requested that the letter be considered "Step 1 of the grievance procedure." After setting forth difficulties she had encountered during her employment by the Machinists, Eichelberger listed five items that she was grieving.[4] These items were:

(1) Sexual harassment.

(2) Unusual treatment regarding wage rates based upon my seniority.

(3) Accusation regarding my honesty in handling union funds.

(4) Intimidation and unfair tactics regarding requesting a letter of resignation.

(5) Employer's failure to remit severance pay.

Failing to receive a reply from the Respondent Union, Eichelberger sent a second letter to Sheridan on December 2. In this letter Eichelberger pointed out "two aspects" of her grievance which she felt were closely related. She stated them as follows:

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[1] Unless otherwise indicated, all dates herein refer to the year 1981.

[2] Eichelberger attended the conference banquet with Fred Waggoner, assistant to Jensen, and his wife. She stated wine was also served with that meal. Eichelberger's unrefuted testimony indicates that at no time during the conference was she criticized about the performance of her duties or accused of drinking too much wine.

[3] Waggoner did not appear as a witness in these proceedings.

[4] See G.C. Exh. 8. Attached to the grievance letter were copies of (1) Eichelberger's letter of resignation; (2) the Machinists' letter of recommendation; (3) Waggoner's letter to Glover; (4) Eichelberger's letter to Glover; (5) a 1980 letter to Sheridan requesting information regarding seniority and wage rates; and (6) a note from a secretary who attended the conference in Seattle commending Eichelberger's "fine help."

> Namely, the intimidation by which *I was forced* to submit a letter of resignation *against my wishes and desires*, and the *refusal to pay severance pay.*

She further stated that, "In fact it was *not a resignation but a constructive discharge.* I was, in fact, given the impression that I *had no choice in the matter.*"[5]

No one from the Respondent Union replied to either of the letters written by Eichelberger. On January 25, 1982, counsel engaged by Eichelberger sent another letter to Sheridan requesting a reply to Eichelberger's grievance. The Respondent Union also failed to respond to this letter.

C. *Respondent Union's Attitude Regarding the Grievance*

Sheridan admitted receiving the October 30 letter and its attachments from Eichelberger. He stated he read them several times and concluded there was no basis for filing a grievance. According to Sheridan, "it was a resignation because the employee determined that perhaps she wasn't happy there; that maybe it would be best to go seek other employment." When questioned as to the basis for his conclusions about Eichelberger's situation, Sheridan stated, "Well, on reading the letter and looking at the attachments, the letter of resignation, the letter of recommendation, there is nothing in Mrs. Eichelberger's letter to me saying I was fired for cause. I want my job back. I want you to file a grievance that I was unjustly discharged. I want to be reinstated." On cross-examination, however, Sheridan testified that he understood "Mrs. Eichelberger was asking the local Union to file a grievance to seek relief on each of those five items that are listed in the letter." Sheridan further acknowledged that he did not contact Eichelberger to ascertain additional facts about her complaints, nor did he contact the Machinists to investigate any of the matters on her behalf.

Upon receipt of the December 2 letter, Sheridan submitted all of the communications from Eichelberger to the Respondent Union's attorney for a legal opinion. In a letter dated January 5, 1982, the attorney advised that the Machinists did not have grounds to discharge Eichelberger but that by resigning the employee removed all basis for processing a grievance. (See G.C. Exh. 1(e), attachment A.)

Sheridan admitted that he failed to notify Eichelberger of the Respondent Union's decision not to process her grievance. This was true even though he was aware that under the terms of the collective-bargaining agreement Eichelberger could have filed the grievance individually with the Machinists provided she did so within 30 days of the occurrence which gave rise to the grievance.[6] When questioned as to why he failed to respond to Eichelberger's first grievance letter, Sheridan stated, "I don't have any excuse for not, you know, responding to the letter in terms of, you know, writing a letter back and saying, you know, we don't have the basis to pursue a grievance. We are not going to pursue the issue."

[5] See G.C. Exh. 9.

[6] G.C. Exh. 2, art. XXIV.

Concluding Findings

As the facts here are not in dispute, I find the basic question to be decided is whether the Respondent Union's failure to respond to Eichelberger's request to process her grievance constitutes a breach of its duty of fair representation. The Respondent Union argues, however, that the "inferential gravamen of the complaint" is that it failed to file a grievance on Eichelberger's behalf within the time limitations set forth in the collective-bargaining agreement. I do not read the allegations of the complaint in such a circumscribed fashion. Subparagraphs (b), (c), and (d) of paragraph 6 of the complaint specifically allege that Eichelberger submitted her grievances to the Respondent Union and received no responses. It is this conduct that is alleged to be a violation of Section 8(b)(1)(A) of the Act and not, as Respondent Union asserts, the failure to file a grievance on behalf of Eichelberger. Thus, it is apparent that the core issue in whether the Respondent Union by failing to timely notify Eichelberger of its decision not to process her grievance engaged in unlawful arbitrary conduct in breach of its representation duty.

It is settled law that where a union has been granted exclusive representative status, the grant of such authority "includes a statutory obligation to service the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, *and to avoid arbitrary conduct.*" (Emphasis added.) *Vaca v. Sipes*, 386 U.S. 171, 176 (1967); *Operating Engineers Local 324 (Michigan Chapter AGC)*, 226 NLRB 587 (1976). It is equally settled that a union has a wide range of discretion in determining how and whether to handle employees grievances; *provided* the exercise of such discretion is not based on discriminatory, arbitrary, or bad-faith considerations. *Groves-Granite*, 229 NLRB 56, 62–63 (1977) (and the cases cited therein).

Applying these principles to the facts of the instant case, I find the Respondent Union's conduct does indeed constitute a breach of its duty of fair representation. It is undenied that, when Sheridan received Eichelberger's letter on November 2, he understood that she was seeking to grieve, among other things, her resignation which she indicated was coerced, and the failure to be granted severance pay. As the chief union representative in charge of enforcing the terms of the collective-bargaining agreement, he was also aware that Eichelberger's right to grieve as an individual would be barred by the agreement 30 days after the resignation she was contesting. In spite of this knowledge, Sheridan made no effort whatsoever to contact Eichelberger to advise her that the Respondent would not process her grievance because it was considered to lack merit; and thereby preserve her right to submit the grievance directly to the Machinists as an individual. Rather, he simply made a determination that the grievance lacked merit and then did nothing.

It is of no consequence that the Respondent Union considered Eichelberger's grievance unmeritorious and decided not to process it. The vice in the Respondent Union's conduct is that it *failed to inform* Eichelberger of its decision, in a timely manner, so that her right to con-

tinue to pursue the matter under the terms of the collective-bargaining agreement would not have been foreclosed.

The Respondent Union argues that its inaction was simply due to "mere negligence" and, relying on *Teamsters Local 692 (Great Western Unifreight System)*,[7] asserts that "something more" than negligent nonaction by a union is required to establish a breach of the duty of fair representation. Contrary to this contention, I find that *Local 692* does not apply to the circumstances found in the instant case. There the conduct alleged to be unlawful was the failure to timely file a grievance. Here, however, by failing to advise Eichelberger that it was not going to process her grievance, or to respond in any fashion, the Respondent Union engaged in conduct which was tantamount to purposely keeping the employee uninformed about the status of her grievance. The detrimental effect of this inaction, or nonaction, is compounded by the fact that it resulted in barring Eichelberger from exercising her right to press her grievance individually under the terms of the contract.

In my judgment, such conduct on the part of the Respondent Union exceeds mere negligence and, in view of the total lack of a logical explanation or justification, must be considered to be arbitrary in nature. Cf. *Auto Workers Local 417 (Falcon Industries)*, 245 NLRB 527, 534 (1980); *Grove-Granite*, supra. Accordingly, I find the Respondent Union breached its duty of fair representation by failing to timely notify Eichelberger that it would not process her grievance. By so doing, the Respondent Union violated Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. International Association of Machinists and Aerospace Workers, Grand Lodge, is an employer within the meaning of Section 2(2) engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent Union, Office and Professional Employees International Union, Local No. 2, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to timely notify Janet Eichelberger that it would not process her grievance, the Respondent Union has breached its duty of fair representation and thereby has violated Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent Union has committed an unfair labor practice, it shall be ordered to cease and desist therefrom and take certain affirmative action which will effectuate the policies of the Act.

In its opening statement the Respondent Union asserted that, even if a violation were found, no monetary responsibility would attach unless it was established that Eichelberger's grievance was in fact meritorious. Doubt was expressed at the hearing that this view was a correct statement of the law and subsequent research has confirmed this doubt.

Settled law holds that while it is not the function of the Board to decide the merits of a grievance in determining whether there is a breach of the duty of fair representation, "it must at least appear from the record that the grievance is not clearly frivolous." *Buffalo Newspaper Guild Local 26*, 220 NLRB 79 (1975); See also *Service Employees Local 579 (Convacare of Decatur)*, 229 NLRB 692 (1977). It is apparent from the record that if Eichelberger's resignation were coerced as she asserted, she would have had a reasonable basis for contesting the action; regardless of whether the outcome would have been favorable to her. Thus, it is evident that Eichelberger's grievance was not "clearly frivolous" and this is sufficient.

Furthermore, the Board does not make a backpay award conditional on the merits of the grievance involved. Any uncertainty as to the results of Eichelberger's grievance (had the Respondent Union timely informed her that it would not process it and thereby afforded her an opportunity to do so individually) must be considered the result of the Respondent Union's conduct. In such circumstances, the Board has consistently resolved the question in favor of the discriminatee and against the wrongdoer. *Henry J. Kaiser Co.*, 259 NLRB 1 (1981). As the unlawful conduct found here was the failure of the Respondent Union to timely inform Eichelberger of its decision not to process her grievance, the backpay shall start from the last day Eichelberger could have individually filed her grievance pursuant to the terms of the collective-bargaining agreement. Although it appears that the grievance is now time barred under the terms of the collective-bargaining agreement, the Respondent Union may be able to prevail upon Machinists to waive those time limits.

Accordingly, the Respondent Union shall be ordered to make Janet Eichelberger whole for any loss of earnings she may have suffered as a result of her resignation from the Northwest Regional Office of International Association of Machinists and Aerospace Workers, Grand Lodge from the date she could have last filed a grievance regarding her resignation, November 12, 1981, until the earlier of the following occurs: the Respondent Union secures consdierations of her grievance by the Machinists and thereafter pursues it in good faith and with due dilegence, or Eichelberger is reinstated by the Machinists, or she obtains substantially equivalent employment. *Henry J. Kaiser Co.*, supra. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).[8]

Finally, since it is apparent that the Respondent Union maintains its office and place of business in Washington, D.C., it shall be ordered to mail copies of the notice attached to this Decision to all employees and members in the bargaining unit employed by International Association of Machinists and Aerospace Workers, Grand Lodge.

[Recommended Order omitted from publication.]

[7] 209 NLRB 446 (1974).

[8] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).